

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Book
PL 1/3
31169

FILE:

B-217059

DATE: May 8, 1985**MATTER OF:**

E.R. Johnson Associates, Inc.

DIGEST:

1. A firm's recourse to contracting agency documents that allegedly support its position, but which it has not been able to secure from that agency, is to pursue the disclosure remedies provided in the Freedom of Information Act. GAO has no authority under that act to determine what information other agencies must disclose.
2. Protest that technical evaluation of proposal was conducted improperly and that award was not made in accord with the evaluation scheme set forth in the RFP is denied. GAO's in camera review of all of the evaluation materials in light of issues raised by protest reveals no basis for finding that agency's evaluation was arbitrary or unreasonable or that evaluation officials abused their discretion. Record supports contracting agency's finding that awardee's proposal was superior to protester's proposal and that evaluations were performed in strict conformance with evaluation scheme set forth in the RFP.
3. In negotiated procurements there is no requirement that award be made on the basis of the lowest cost. The procuring agency has the discretion to select a higher rated technical proposal instead of a lower rated, lower cost proposal if doing so is consistent with the evaluation scheme in the solicitation.

E.R. Johnson Associates, Inc. (JAI) protests the award of a contract to Westinghouse Hittman Nuclear, Inc. (Westinghouse) under request for proposals (RFP) No. F08635-84-R-0157, issued by the Air Force to identify and evaluate alternative methods of disposal of depleted uranium wastes generated at Eglin Air Force Base, Florida. JAI contends that it was fully qualified to perform the subject contract and submitted a technically acceptable proposal with a firm

031976

fixed price at approximately half the cost of the Westinghouse proposal. Because the procuring agency did not abuse its discretion in its technical evaluations and because cost was a secondary factor in selection, we deny the protest.

The solicitation was issued July 19, 1984, covering a research and development effort to identify and evaluate alternatives or combinations of alternatives for the disposal of depleted uranium wastes generated at Eglin Air Force Base. Each alternative would be analyzed in sufficient detail to serve as the basis for future Air Force decisions regarding depleted uranium disposal. Twenty-nine firms were competitively solicited, and fourteen proposals were received, of which thirteen were determined to be technically acceptable. Of the thirteen responses found to be technically acceptable, the proposal submitted by Westinghouse was rated the highest on technical merit alone. Discussions were held with each of the thirteen offerors, with weaknesses pointed out and best and final offers (BAFOs) submitted by September 21, 1984.

After discussions and BAFOs, the proposal submitted by Westinghouse was still the highest rated technical proposal and was determined to represent the proposal most advantageous to the government on the basis of technical merit and cost combined. Award was made to Westinghouse on September 28, 1984 in the amount of \$180,222.80. JAI was notified by the contracting officer's letter of the same date that award had been made to Westinghouse and that its offer, while technically acceptable, was not the superior offer. JAI protested the contract award to the contracting officer on October 5, 1984, which protest was denied on October 29. On November 7, 1984, JAI filed its protest with this Office.

At the outset, JAI complains that material it received in response to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), request was so heavily expurgated by the Air Force that it is unable to provide more explicit comments in support of its protest. Contending that germane information has been withheld by the Air Force, JAI asks this Office to conduct a thorough investigation of this procurement to include documents in the possession of the Air Force to determine whether the contract was awarded in the public interest. In this regard JAI suggests that any technical superiority of the Westinghouse proposal may be due to the inclusion in that proposal of additional work beyond that requested and may have resulted in an award to

obtain capabilities that exceed those needed for successful performance of the work requested by the RFP.

We have no authority to determine when or what information must be disclosed by an agency in response to a FOIA request. Ikard Mfg. Co., 63 Comp. Gen. 239 (1984), 84-1 C.P.D. ¶ 266. A firm's recourse to the contracting agency's denial of its request for documents that allegedly support its position is to pursue the disclosure remedies provided in the Act. United States Contracting Corp.--Reconsideration, B-210275.2, Dec. 28, 1983, 84-1 C.P.D. ¶ 31. Although the Air Force has denied the protester access to its competitor's proposal and to much of the technical evaluation material, it has provided all of the requested material to our Office for our review. Due to the proprietary nature of much of this material and because the Air Force has denied much of the protester's FOIA claims, we have reviewed all of the proposals and evaluation material in camera. Our discussion of their contents, however, is limited because of the agency's restriction on their disclosure. Eaton-Kenway, B-212575.2, June 20, 1984, 84-1 C.P.D. ¶ 649; Robert E. Derecktor of Rhode Island, Inc.; Boston Shipyard Corp., B-211922, B-211922.2, Feb. 2, 1984, 84-1 C.P.D. ¶ 140.

In undertaking such a review, this Office does not independently determine the relative merits of proposals, since the evaluation of proposals is primarily a matter of the procuring agency's discretion. We therefore limit our review to an examination of whether the evaluation was reasonable and in accordance with the listed evaluation criteria, and we will not question an agency's technical evaluation unless it is shown to be arbitrary or in violation of procurement statutes and regulations. New Mexico State University/Physical Science Laboratory, B-215348, Nov. 6, 1984, 84-2 C.P.D. ¶ 504; Eaton-Kenway, B-212575.2, supra. Additionally, the protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's evaluation of its proposal does not in itself render the evaluation unreasonable. Litton Systems, Inc., Electron Tube Div., 63 Comp. Gen. 585 (1984), 84-2 C.P.D. ¶ 317.

Based upon our in camera review of both Westinghouse's and JAI's proposals and all pertinent evaluation documents, we conclude that the Air Force evaluation had a reasonable basis and was in conformity with the evaluation provisions of the RFP. In this connection, the RFP stated that, "This is a technical competition with cost considered subordinate

to other factors; therefore, the technical and management areas will be given paramount consideration in the evaluation process." The evaluation documents generally show that, while the protester's strength was its low price, Westinghouse's strength was its superior technical proposal. Both proposals were rated superior in the management area. The technical evaluators and the contracting officer cited several specific advantages of Westinghouse's technical proposal over the protester's, particularly regarding the great detail in which Westinghouse discussed identification and analysis of disposal alternatives. In contrast, the JAI proposal discussed objectives and methodologies in very general terms which demonstrated less JAI's familiarity with the specific waste disposal problem faced by the Air Force. In this regard, the solicitation advised offerors that proposals should not merely offer to conduct an investigation or perform work in accordance with the statement of work, but rather should outline the actual investigation or method proposed as specifically as possible.

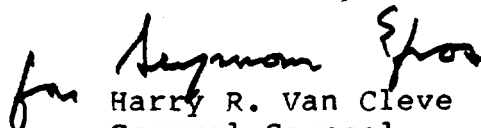
As an example of the differences in proposal approaches, where the statement of work called for an evaluation of alternatives for on-site disposal, Westinghouse elaborated extensively on the subject--including, among other things, discussion of regulatory requirements, technical requirements, site characteristics, and environmental concerns, thus demonstrating its technical capacity to deal with a specifically delineated disposal alternative and its familiarity with related government program initiatives, results, and regulations. JAI's response, on the other hand, was very brief and extremely general in nature, and, thus, did not demonstrate either JAI's capacity or ingenuity regarding this disposal alternative.

Our review of the record confirms the Air Force's judgment that Westinghouse's proposed approach is more complete and better defined. As the evaluation documents indicate, the protester consistently failed to provide the quantum of detailed discussion and analysis required by the RFP or to demonstrate its familiarity and understanding of the Air Force's requirements, while Westinghouse did provide the required detailed analysis. Thus, the Air Force reasonably had much greater confidence in Westinghouse's proposal even though JAI's approach was considered technically acceptable. There is no evidence in the record that Westinghouse was given a higher technical rating for

offering to perform work which was not required under the RFP as the protester alleges. In a negotiated procurement such as this, the government is not required to make award to the firm offering the lowest cost unless the RFP specifies that cost will be the determinative factor. The Communications Network, B-215902, Dec. 3, 1984, 84-2 C.P.D. ¶ 609. Here, the RFP specifically reserved to the government the right to make award to other than the lowest offeror. We have upheld an award to a higher rated offeror with significantly higher proposed costs where it was determined that the cost premium involved was justified considering the significant technical superiority of the selected offeror's proposal. Stewart & Stevenson Services, Inc., B-213949, Sept. 10, 1984, 84-2 C.P.D. ¶ 268.

There is ample support in the record for the Air Force's determination that the technical superiority of Westinghouse's highest rated proposal justified the additional cost to the government. Although JAI's proposal was rated "technically acceptable" in a ranking of technical merit, it was nonetheless ranked in the lower 50 percent of all proposals received, and at one point, the technical evaluators even considered eliminating it from the competitive range because it was rated significantly below the highest ranked technical proposals. See Stewart & Stevenson Services, Inc., B-213949, *supra* at 7. Moreover, the record shows that acceptance of the Westinghouse proposal may result in significant cost savings to the government in the long run. Accordingly, the Air Force concluded that the lower price proposed by JAI did not make up for the technical inferiority of its proposal.

In these circumstances, we find that the Air Force's evaluation was reasonable and in accordance with the stated evaluation criteria and, therefore, not subject to objection by our Office. We deny the protest.


Harry R. Van Cleve
General Counsel